MALAYSIAN REPORTS

LEE WAH BANK LIMITED v. JOSEPH EU

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Salleh Abas F.JJ.) July 26, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 207 of 1978]

Contract — Surety — Liability of surety — Co-extensive with that of principal debtor — Discharge of surety — Bankruptcy — Release in bankruptcy does not discharge surety — Bankruptcy Act, 1976, s. 35(4) — Contracts Act, 1950, ss. 81 and 87.

Bankruptcy — Liability of surety — Release in bankruptcy does not discharge surety — Bankruptcy Act, 1967, s. 35(4).

Practice and Procedure — Summary judgment — R.S.C. O. 14.

The question in this case was whether the surety was released upon the discharge and annulment of the receiving and adjudicating orders against the principal debtor. Both the Assistant Registrar and the learned judge of the High Court held that the surety was discharged. The appellant bank appealed.

Held: a release in bankruptcy does not discharge the surety, as the discharge is not the act of the creditor but by operation of law, that is, it is the bankruptcy law and not the creditor that discharges the bankrupt.

Cases referred to:-

(1) *In re Fitzgeorge Ex parte Robson* [1905] 1 K.B. 462.
(2) *Subramanian* v. *Batcha Rowther* A.I.R. 1942 Mad. 145.
(3) *Bank of India* v. *Cowasjee* A.I.R. 1955 Bom. 419, 421.
(4) *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457.
(5) *Citibank N.A.* v. *Ooi Boon Leong & Ors.* F.C.C.A. 21/79 (unreported).

FEDERAL COURT.

P. Royan for the appellants.

Ronald Khoo for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The short point in this appeal is whether the surety is released upon the discharge and annulment of the receiving and adjudicating orders against the principal debtor.

Both the Assistant Registrar and the learned judge thought so. Counsel on behalf of the appellant bank ("the bank") contended to the contrary. Relying on Commonwealth cases i.e. *In re Fitzgeorge;*[1] *Subramanian* v. *Batcha Rowther;*[2] *Bank of India* v. *Cowasjee*[3] and *McDonald* v. *Dennys Lascelles Ltd.*,[4] he argued that discharge of the bankrupt debtor in no way affects the liability of the surety who has guaranteed the debt of the bankrupt.

The provisions of section 35(4) of the Bankruptcy Act, 1967 which is *in pari materia* with section 28(4) of the United Kingdom Bankruptcy Act, 1914 was also cited to us in support of the proposition. The sub-section is as follows:

"An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him or any person who was surety or in the nature of a surety for him."

The contention that found favour both with the Assistant Registrar and the learned judge is this: In essence a surety's obligation is to satisfy the obligation of the principal debtor; and therefore once that obligation is gone, in other words once the principal debt is gone, the liability under the guarantee also disappears. It is the application of the general rule of contract which is embodied in statutory form in sections 81 and 87 of the Contracts Act, 1950:

"81. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

87. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor."

It may be observed that in such cases it is the act or omission of the creditor that discharges the liability of the surety, e.g. when the creditor enters into a contract with the principal debtor without the consent of the surety. To that general rule there is, however, an exception. A release in bankruptcy does not discharge the surety. That is because the discharge is not the act of the creditor, but by operation of law, i.e. it is the bankruptcy law and not the creditor that discharges the bankrupt. *Generalia specialibus non derogant.* In *Subramanian* v. *Batcha Rowther, supra,* it was held:

"that a discharge of the principal debtor by operation of law does not discharge the surety,"

and the remedy of the creditor against the guarantor should not be restricted to the amount that the debtor may by operation of law be compellable to pay. The rule applicable to cases of this nature was very clearly enunciated in *In re Fitzgeorge; Ex parte Robson, supra,* where Bigham J. says: (page 464).

"I think in this case that the creditor is entitled to prove for the value of the guarantee that the debtor has given. It is said that, because the principal debt is gone, therefore, the liability under the guarantee to pay the interest on the debenture is also gone. I do not agree with that view. The principal debt is gone no doubt, but not by any act of the creditor. It is gone by operation of law. The principal debt will never be repaid, but in my opinion, the obligation of the debtor to pay interest under his guarantee remains."

The remaining question therefore that arises here for our determination is whether the bank is entitled to an Order 14 judgment. The principle applicable in this sort of cases has been stated very often in this court in recent years, the last case being in *Citibank N.A.* v. *Ooi Boon Leong & 2 Ors.*:[5]

"Where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the R.S.C. Order 14 procedure."

In the result the appeal is allowed and there will be an Order 14 judgment in favour of the bank for $40,832.92 with costs here and below.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Shearn Delamore & Co.*